2021 WL 4642785
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

VARGAS
v.
QUEST DIAGNOSTICS

Case No. CV 19-8108 DMG (MRWx)
|
Filed 09/08/2021

Attorneys and Law Firms

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Proceedings: ORDER RE: FEE AWARD

Michael R. Wilner, United States Magistrate Judge

***1** 1. The Court previously ruled in favor of Plaintiffs on the cross discovery motion dispute. (Docket # 87.) Plaintiffs subsequently submitted a request for fees in the amount of $25,000. (Docket # 89.) The Quest defendants filed a vigorous opposition brief. (Docket #91.)

2. The Court concludes that a token fee award is appropriate. Quest correctly argues that its position on the mediation privilege issue was "substantially justified" given the lack of clarity in both the Judicate West form and federal common law. However, Quest ducked the Court's primary basis for ruling in Plaintiffs' favor: the requested discovery was not relevant to any claim or defense.

3. And, in light of the "sharp" discovery practices of both sides and the excessive billing that the Court reviewed – well, a plague on both your houses. In an exercise of discretion, the defense will be ordered to pay $1,500 in fees to Plaintiffs.

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4. Federal Rule of Civil Procedure 37(a)(5) allows a victorious party in a discovery motion to recover its "reasonable expenses incurred in making [or opposing] the motion, including attorney's fees." However, a court "must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(B).

5. Rule 37(a)(5) "is really aimed at curbing discovery abuses and preventing waste of judicial time when there is no genuine dispute." Phillips & Stevenson, Federal Civil Procedure Before Trial, ¶ 11:2386 (The Rutter Group 2021) (emphasis omitted) (formerly Schwarzer, Tashima, & Wagstaffe). A "genuine dispute" is one in which "reasonable people could differ as to the appropriateness of the contested action." Id. at ¶ 11:2382 (citing cases); Reygo Pacific Corp. v. Johnston Pump Co., 680 F.2d 647, 649 (9th Cir. 1982) (interpreting the then-recent fee-shifting amendment to Rule 37, noting that "A request for discovery is 'substantially justified' under the rule if reasonable people could differ as to whether the party requested must comply.") The losing party to a discovery motion bears the burden "affirmatively to demonstrate that its position was substantially justified." Phillips & Stevenson, ¶ 11:2382.

6. It is "for the court to decide what amount is proper" in evaluating a request for expenses. 8B Wright, Miller & Marcus, Federal Practice & Procedure, § 2288 (3d ed. 2010 and supp.). An appellate court reviews an award of fees or sanctions for abuse of discretion. R&R Sails, Inc. v. Insurance Co. of Pennsylvania, 673 F.3d 1240, 1245 (9th Cir. 2012); Republic of Ecuador v. Mackay, 742 F.3d 860, 864 (9th Cir. 2014).

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7. In the fee opposition brief, the defense completely ignored (a) the main thrust of our discussion at oral argument on the discovery motions and (b) the bulk of the order on the merits of the discovery. Quest never explained how questioning the ACB rep about its evaluation of the settlement proposal was possibly relevant to a claim or defense in the action.

8. Yet, the company's irrelevant and aggressive discovery requests started the ball rolling on the extensive litigation

that followed. Quest was not substantially justified in pursuing this line of discovery. A fee-shift award in some amount is appropriate based on this circumstance.

***2** 9. The company is on firmer ground to argue that it was substantially justified in asserting its lack-of-privilege contentions. As the Court explained – in its alternative ruling to shut down this line of discovery – there are legitimate disputes as to the existence and scope of a federal mediation privilege (even though the Court is pretty convinced that the privilege exists and protects disclosure here). To the extent that the parties spilled ink on this question, Quest's position was not so unreasonable under the law to fail this generous part of Rule 37(a)(5).

10. It's also not lost on me that this has been a cantankerous bit of litigation. The parties previously presented several disputes to Judge Wilner regarding discovery and case management. (Docket # 49, 56, 69.) I can't say that one side or the other has been exclusively responsible for causing the problems to date; perhaps the hostilities have been mutual.

11. Finally, I'm just astounded that Plaintiffs would submit a bill purporting to document 52.3 hours of time expended on a run-of-the-mill discovery dispute.[1] The rule limits recovery to "reasonable expenses incurred in opposing the motion." Fed. R. Civ. P. 37(a)(5)(B). Plaintiffs' bill is facially excessive, unreasonable, and out of line with this Court's experience and expertise with discovery matters.

12. The solution, then, is a nominal award in favor of Plaintiffs to compensate them for dealing with Quest's irrelevant discovery requests, but one that falls far short of the luxurious billing that Plaintiffs presented. In an express exercise of discretion, an award of $1,500 (or three hours at the non-luxurious rate of $500/hour spent on the parts of the briefing that actually assisted the Court) is appropriate to satisfy Rule 37. R&R Sails, 673 F.3d at 1245.

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13. Rule 37(a)(5)(B) expressly allows the Court to order the "the movant, the attorney filing the motion, or both to pay" a fee award. I have no reason to believe that the litigation strategy that Quest's lawyers pursued in this discovery matter was made without the company's involvement and approval. Therefore, Quest and its lawyers are jointly and severally liable for payment of the award. The payment to Plaintiffs will be made within 14 days of this order. The defense will promptly file a notice with the Court to document the payment.

14. The Court expressly opines that the fee award in this action should not be considered a personal sanction on an attorney that is potentially reportable to the State Bar of California pursuant to Business and Professions Code section 6068(o)(3). C.f. Medina v. United Parcel Service, No. C-06-791 JW PVT, 2007 WL 2123699 (N.D. Cal. 2007) (state statute "exempts" discovery-related proceedings from self-reporting obligation).

All Citations

Slip Copy, 2021 WL 4642785

Footnotes

1 Did Plaintiffs admit that they included in the billing paralegal time for clerical or editorial tasks? (Docket # 89 at 3.) Well, that's a no-no. Nadarajah v. Holder, 569 F.3d 906, 921 (9th Cir. 2009) (fee award may not include time spent on tasks that are "clerical in nature and should have been subsumed in firm overhead" rather than billed at paralegal's rates); Hernandez v. Spring Charter, Inc., 2020 WL 1171121 at *7 (N.D. Cal. 2020) (same; "Tasks such as preparing proofs of service, processing records" and preparing court documents for filing "have been found to be purely clerical tasks for which fees are not recoverable.").